No. 83-218

In The
Supreme Court of the United States
October Term 1983

AMOS REED, etc. and the
ATTORNEY GENERAL OF THE
STATE OF NORTH CAROLINA,

Petitioners,

v.

DANIEL ROSS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CASES

TABLE OF CASES—Continued

TABLE OF CASES—Continued

TABLE OF CASES—Continued

TABLE OF CASES—Continued

TABLE OF OTHER AUTHORITIES

No. 83-218

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OPINION BELOW

The opinion below is reported at 704 F2d 705 (4th Cir. 1983) and is printed as Appendix A to the Petition for Writ of Certiorari, pp. 9-16.

JURISDICTION

The jurisdiction of this Court was invoked under 28 USC § 1254(1) within ninety days of the denial of the petition to rehear, May 4, 1983, a copy of which is printed as Appendix B to the Petition for Writ of Certiorari (p. 17).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

U.S. Constitution, Article VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

U.S. Constitution, Article XIV:

"No state . . . deprive any person of life, liberty or property, without due process of law."

(Former) Rules Of Practice In The Supreme Court

19. Transcripts

(3) *Exceptions Grouped.* All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed, or the Court will in its discretion refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than

$5 will be made, to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

21. Exceptions

When appellant is required to serve a case on appeal, he shall set out in his statement of case on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When case on appeal is not required, appellant shall file said exceptions in the office of the clerk of the court below within ten days next after the end of the term at which judgment is rendered from which the appeal is taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof. No exceptions not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complainant does not state a cause of action, or motions in arrest for the insufficiency of an indictment. . . .

(Current) Rules Of Appellate Procedure

Rule 10. Exceptions and Assignments of Error in Record on Appeal.

(a) **Function in Limiting Scope of Review.** Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported

by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

(b) (2) **Jury Instructions.** . . . No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection. . . . (As Amended effective 1 October 1981).

Rule 28. Briefs: Function and Content.

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

North Carolina General Statutes

§ 15-217. **Institution of proceeding; effect on other remedies.**—Any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work under the supervision of the State Department of Correction, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or

of the State of North Carolina or both, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common-law or statutory remedy, as to which there has been no prior adjudication by any court of competent jurisdiction, may institute a proceeding under this Article.

The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction, but, except as otherwise provided in this Article it comprehends and takes the place of all other common-law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment, and shall be used exclusively in lieu thereof. (Repealed effective July 1, 1978.)

§ 15-218. **Contents of petition; waiver of claims not alleged.**—The petition shall identify the proceedings or trial in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and shall clearly set forth the respects in which petitioner's constitutional rights were violated or in which he is illegally detained, and shall state that the questions raised have not heretofore been raised or passed upon by any court of competent jurisdiction. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. The petition shall also identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition. Any claims of substantial denial of constitutional rights or of other error remediable under this Article not raised or set forth in the original or any amended petition shall be deemed waived, unless the court, upon consideration of a subsequent petition, finds a ground for relief

asserted which for sufficient reason was not asserted or was inadequately asserted in the original or amended petition. (Repealed effective July 1, 1978.)

§ **15A-1411. Motion for appropriate relief.**—(a) Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief. Procedure for the making of the motion is as set out in G.S. 15A-1420. (Effective July 1, 1978.)

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§ **15A-1419. When motion for appropriate relief denied.**—(a) The following are grounds for the denial of a motion for appropriate relief:

(1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment.

(2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

(3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

(b) Although the court may deny the motion under any of the circumstances specified in this section, in the interest of justice and for good cause shown it may in its

discretion grant the motion if it is otherwise meritorious. (Effective July 1, 1978.)

Federal Rules of Evidence

Rule 201. Judicial Notice of Adjudicative Facts.

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judiical notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

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(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

SUMMARY OF ARGUMENT

Appellate procedural defaults should be governed by *Wainwright v. Sykes, supra*, because the most important considerations underlying *Sykes*, comity and relative finality, are equally applicable to defaults occurring in the appellate context. The majority of the circuit courts

have come to this conclusion and, in addition, the Court's repeated emphasis on the role of counsel and the fact that other of counsel's decisions about a case are final and bind the client also demonstrates this. If *Sykes* is applied to this case, novelty of the issues is not an adequate cause to excuse the default, although it has been favorably accepted as such otherwise. This is because the court has already indicated in *Engle v. Isaac, supra,* fn. 39, that the issues Ross raises were not novel in 1969. This is certainly so in view of the longstanding federal rule on burden of proof in conjunction with the fact that in the 1960's numerous federally guaranteed rights were being made applicable to the states and litigation about burden of proof had resulted in three published decisions the year prior to Ross' trial.

STATEMENT OF THE CASE

Daniel Ross was convicted of murder in the first degree in March 1969 for killing his wife and was given a life sentence (A. 16), although his testimony was that he acted in self-defense (A. 17-19). The instructions in his case apparently placed the burden of proof on him to prove self-defense in one context (A. 23-24) and on the state to prove this in another context (A. 26). The instructions also gave the state the benefit of a presumption on the elements of malice and unlawfulness in the charge on second-degree murder because a deadly weapon had been used (A. 23-24). Ross did not object to these instructions at trial but did not have to under state law at the time in order to have them reviewed on appeal,

State v. Gause, 227 NC 26, 40 SE2d 463 (1946). Additionally, on appeal he did not except to these instructions, as was required, although he did argue that his self-defense instructions were substantively incorrect. The Supreme Court, however, in its opinion generally endorsed the instructions (A. 26-27).

The instructions on self-defense and the presumptions of malice and unlawfulness arguably were unconstitutional under the later cases of *In re Winship*, 397 US 358, 90 S.Ct. 1068, 25 LEd2d 368 (1970) and *Mullaney v. Wilbur*, 421 US 684, 95 S.Ct. 1881, 44 LEd2d 508 (1975). Therefore in 1977, Ross challenged them in a post-conviction petition in state court which was unsuccessful at both the trial and appellate levels. Although currently not a part of the record, the parties request that the Court judicially notice these proceedings (p. A-1, *post*) Reed also requests that Ross' appeal brief on the issue of self-defense be noted.

Following his turndown by the state courts, Ross filed a petition for writ of habeas corpus in federal court, with the state pleading forfeiture because the issues were not raised on appeal (A. 5-10). Ultimately, this position was accepted by the District Court (A. 27); however the Fourth Circuit Court of Appeals, after remand from this Court, *Ross v. Reed*, 456 US 921, 102 S.Ct. 1963, 72 LEd2d 436 (1983), found cause to excuse the forfeiture, holding the instructions would have been novel at the time of Ross' appeal for the reason that Winship had not then been decided. The Court of Appeals then went on to hold for Ross on the substantive issue of whether the instructions violated due process of law by shifting the burden

of proof (Pet. Cert. p. App. 1). Before this Court, Ross has sought review only of the novelty issue.

ARGUMENT

I.

North Carolina's Procedural Bar Against Reviewing In A Post-Conviction Proceeding Issues Which Could Have Been Presented On Appeal Presumptively Was Relied On To Bar Relief To Ross Although The State Court Orders Did Not Expressly Indicate This; And The Materials Necessary For This Determination, While Not A Part Of The Record In This Case, May Be Judicially Noticed.

Ross appealed his conviction and while arguing the instructions on self-defense were erroneous as to substantive content did not make any claim that the burden of proof was put on him wrongly with regard to this or with regard to malice and unlawfulness. Under North Carolina law at that time, *State v. White*, 274 NC 220, 162 SE2d 473 (1968) in conjunction with former NCGS §15-217, 218 and former Rules of Practice in the Supreme Court, 19(3), 21, this meant review of his claim was forfeited in state court, *State v. Abernathy*, 36 NC App. 527, 244 SE2d 696 (1979). The thought behind this was that collateral review is not a substitute for appeal, a view which currently guides habeas review of federal convictions as well, *United States v. Frady*, 456 US 152, 102 S.Ct. 1584, 71 LEd2d 816 (1982).[1]

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[1] Later changes in North Carolina's court rules and statutes carry forth essentially the same distinction, Rules of Appellate Practice 10(a), 28(a), NCGS § 15A-1411, 1419. However, in State v. Bush, 307 NC 152, 297 SE2d 563 (1982), it was not applied.

The procedural bar above presumptively was relied on in state court to adjudicate Ross' claims. Although these proceedings are not currently a matter of record before the Court, it is expected that judicial notice will be taken of them as this is permitted, FRE 201(f); Wright and Miller, *Federal Practice and Procedure*, Sec. 5110; *Green v. Warden*, 699 F.2d 364 (7th Cir.), *cert. denied*, 456 US 994, 103 S.Ct. 2436, 77 LEd2d 1321 (1983); *United States ex rel. Geisler v. Walters*, 510 F.2d 887 (3rd Cir. 1975), *Paul v. Dade County Florida*, 419 F.2d 10 (5th Cir.), *cert. denied*, 397 US 1065, 90 S.Ct. 1504, 25 LEd2d 686 (1970); *Granader v. Public Bank*, 417 F.2d 75 (6th Cir.), *cert. denied*, 397 US 1065, 90 S.Ct. 1503, 25 LEd2d 686 (1970). While the orders at both the trial and appellate levels are silent as to whether procedural or substantive reasons were relied on, the factors identified in *Hayes v. Alabama*, 566 F.Supp. 108 (SD Ala. 1983) for making this determination indicate that the disposition was made on procedural grounds; see also *Edwards v. Jones*, 720 F.2d 751 (2nd Cir. 1983), *Dobbert v. Strickland*, 718 F.2d 1518 (11th Cir. 1983); *Rollins v. Maggio*, 711 F.2d 592 (5th Cir. 1983). These factors include the clarity of state procedural law, *State v. White, supra; State v. Abernathy, supra*, and the fact that its application would be correct here; the presentation of a procedural defense by the state (p. A-7, *post*); the preference for avoiding constitutional questions, *State v. Fincher*, 309 NC 1, — SE2d — (1983); *State v. Smith*, 211 NC 206, 189 SE2d

509 (1937); and the numerous rejections of review after *Mullaney* on the issues Ross raised unless they had been raised on direct appeal.[2]

II.

The Procedural Default Doctrine Of Wainwright v. Sykes, Supra, Should Apply To Appellate Defaults As Some Of The Most Important Previously Articulated Thoughts Underlying It Apply In The Appellate Context. These Include Preventing Stale Retrials And Reducing The Stresses On Federalism. The Majority Of The Circuits Have Accepted This View; And This Court's View Of The Role Of Counsel As Well As The Language Of The Court's Recent Decisions On Forfeiture Indicate It Is The Better Approach.

The procedural bar Reed relies on should require a forfeiture under the Court's decisions. In *Wainwright v. Sykes*, *supra*, the Court held that state procedural forfeiture rules could bar federal habeas relief. While it dealt with trial level defaults, as did its precursers, *Francis v. Henderson*, 425 US 536, 96 S.Ct. 1708, 48 LEd2d 149 (1976) and *Davis v. United States*, 411 US 233, 93 S.Ct. 1577, 36 LEd2d 216 (1973), and left open the question of its application to appellate defaults, these long have been recognized as sufficient to bar further review by this Court

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[2] *State v. Brower*, 293 NC 259, 243 SE2d 143 (1977); *State v. Crowder*, 293 NC 259, 243 SE2d 143 (1977); *State v. Jackson*, 293 NC 260, 247 SE2d 234 (1977); *State v. May*, 293 NC 261, 247 SE2d 234 (1977); *State v. Riddick*, 293 NC 261, 247 SE2d 234 (1977); in comparison with *State v. Hankerson*, 293 NC 260, 247 SE2d 234 (1977); *State v. Sparks*, 293 NC 262, 248 SE2d 339 (1977); *State v. Wetmore*, 293 NC 263, 248 SE2d 338 (1977). For the Court's convenience in review, a specimen of each type of order is included as an addendum to this brief, p. A-8-10, post.

on direct appeal. In light of this, the majority of the circuits have applied *Sykes* to appellate defaults as well, *Evans v. Maggio*, 557 F.2d 430 (5th Cir. 1977); *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir.), *cert. denied*, 449 US 1004, 101 S.Ct. 545, 66 LEd2d 301 (1980); *Forman v. Smith*, 633 F.2d 634 (2nd Cir.), *cert. denied*, 450 US 1001, 101 S.Ct. 1710, 68 LEd2d 204 (1981); *Myers v. Washington*, 646 F.2d 355 (9th Cir.), *vacated and remanded*, 456 US 921, 102 S.Ct. 1964, 72 LEd2d 436 (1982), decision after remand, 702 F.2d 766 (1983), *Hubbard v. Jeffes*, 653 F.2d 99 (3rd Cir. 1981), *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983). Two circuits do not apply it to appellate defaults, *Berrier v. Eglier*, 583 F.2d 515 (6th Cir.), *cert. denied*, 439 US 955, 99 S.Ct. 354, 58 LEd2d 347 (1978), *Holcomb v. Murphy*, 701 F.2d 1307 (10th Cir. 1983); and one other circuit also leans in this direction, *Rinehart v. Brewer*, 561 F.2d 126 (8th Cir. 1977). At least two groups of decisions from this Court show that the majority approach in the circuits is the right one, although two cases—*Fay v. Noia*, 372 US 391, 83 S.Ct. 822, 9 LEd2d 837 (1963) and *Kaufman v. United States*, 394 US 217, 89 S.Ct. 1068, 22 LEd2d 227 (1969)—do not support it.

The first group consists of those decisions which emphasize the role of counsel in the criminal process. In *McMann v. Richardson*, 397 US 759, 770, 90 S.Ct. 1441, 25 LEd2d 763 (1970) discussing forfeiture by guilty plea, the Court said with regard to legal evaluations:

> In our view, a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and

> therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter not on whether a court would retrospectively consider counsel's advice to be wrong or right, but whether that advice was within the range of competence demanded of attorneys in criminal cases.

The same approach was taken with regard to pretrial investigative decisions in *Tollett v. Henderson*, 411 US 258, 267, 93 S.Ct. 1602, 36 LEd2d 235 (1973). Later the emphasis on the role of counsel was noted by three justices in their concurrences to *Sykes, supra* at 92-93, 94; 94-95; 98-99, in support of its holding; and a year earlier it had also been mentioned in coming to the decision in *Estelle v. Williams*, 425 US 501, 512, 96 S.Ct. 1691, 48 LEd2d 126 (1976). Recently, this same recognition resulted in the decision in *Jones v. Barnes*, — US —, 103 S.Ct. 3308, 77 LEd2d 987 (1983), holding that the matter of which issues to argue on appeal ought to be viewed as counsel's prerogative, putting the issues Ross has raised in the same category as strategic decisions before and during trial.

The second group of cases supporting the extension of *Sykes* to an appellate default context consists of the Court's two recent forfeiture cases, *Engle v. Isaac*, 456 US 107, 102 S.Ct. 1558, 71 LEd2d 783 (1982) and *United States v. Frady*, 456 US 152, 102 S.Ct. 1584, 71 LEd2d 816 (1982), the first of which confirmed a suggestion in footnote eight of *Hankerson v. North Carolina*, 432 US 233, 244, 97 S.Ct. 2339, 53 LEd2d 306 (1977). In *Frady*, there are continual references to failure to raise on appeal the issues involved in his collateral attack, *id.* 158, 162, 164,

165; while in *Isaac*, the Court's language inferentially supports application of *Sykes* to appellate defaults by emphasizing two of the costs in current federal habeas practice—stale retrials and stresses on federalism—each of which costs are as heavy whether appellate defaults or trial defaults are involved. These costs are *Sykes'* strongest considerations and *Forman* and *Ho'comb* while reaching different conclusions both note that they favor the extension of *Sykes* to appellate default.[3]

The extension of *Sykes* to appellate level defaults is certainly correct. This applies its middle ground approach (between *Fay* and its predecessors) to a context where there has already been delay and therefore where the importance of concluding the litigation at that point is even more pressing, while encouraging a more liberal appellate review system by providing an assurance that this alone would not create an additional jeopardy of reversal in federal court, years on down the line. The first

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[3] To these, the Seventh Circuit has added a refinement in noting the effect of *Sumner v. Mata*, 449 US 539, 101 S.Ct. 764, 66 LEd2d 722 (1981) in making it now even more important for a prisoner to avoid state court, *United States ex rel Spurlark v. Wolff*, 699 F.2d 354 (7th Cir. 1983). Further, as a matter of practice in North Carolina, the Supreme Court on direct review is in a much better position to review claims than is a trial judge on collateral review owing to several facets of local practice including the rotation of state court judges and their lack of extensive research support. In addition to these considerations, another long standing body of law, by analogy, supports the resolution Reed urges on the Court. Under the Rules of Decision Act, 28 USC § 632, it has long been held that state time limitations apply to federal actions, and use of a federal forum cannot extend them, see for example *Rawlings v. Ray*, 312 US 96, 61 S.Ct. 473, 85 LEd2d 398 (1940). The limitation of certain issues to appeal is, in effect, a time limitation.

of these would help the judicial institution while the second would help the convicted individual. Moreover, extension of *Sykes* to appellate defaults requires a focus on the whole of the judicial system on which we all count to enforce our constitutional liberties and is in line with numerous realities including the facts that our judicial system never guarantees more than opportunities to persuade; that habeas corpus review is largely a review of procedures; that habeas corpus can be and currently is subject to a number of limitations; that the common good (including that of a prisoner *vis a vis* other prisoners' suits) is enhanced by a procedurally predictable judicial system; that responsibility for one's agents is a fact of adult life; that in a system of limited judicial resources, time must be made for other persons' complaints; and that as serious a consequence as imprisonment is, it does not mean that a person subject to it can be allotted every conceivable procedure to escape it. For these reasons, as well as the authorities above, *Sykes* applies here.

III.

No Cause Exists To Excuse Ross' Procedural Default. His Claim Was Not Novel. Even If Novelty Is Adequate Cause, The Tools For Making His Arguments Had Been Available Since 1961 And Other Defendants Had Been Making Them Since 1968, The Year Before Ross' Trial. Moreover, Even If Novel, The Claims Here Did Not Involve A Miscarriage Of Justice In The Sense Used In The Sykes Case As The Presumptions Of Malice And Unlawfulness Were Justified And The Constitution Permits The Burden Of Proof On Self-Defense To Be Put On An Accused.

The *Sykes* case does not require forfeiture due to every default but leaves open the possibility of showing sufficient cause to excuse it and prejudice from it to keep an issue reviewable. The necessity for showing prejudice is not before the Court because it was conceded below (perhaps erroneously in retrospect).

The Court has not defined cause but the reference to it as a way to prevent a miscarriage of justice, *Sykes* at 91, plus a well-established body of law in other contexts to draw from suggests new law to define it may not necessarily have been contemplated and at least suggests some examples. The inadequacy of the state ground and ineffective assistance of counsel immediately come to mind, closely followed by government prevention and the failure of the state to honor a state procedural rule in a given case. In addition, two new suggestions for cause have been made—novelty in *Isaac,* and failure to honor a reasonable client request in *Barnes*—and it is the former that the Fourth Circuit relied on, a ground also recognized in two other circuits, *Sullivan v. Wainwright,* 695 F.2d 1306 (11th Cir. 1983) and *Myers v. Washington, supra.*

Novelty does not exist here. In *Isaacs,* it spoke of this in context of requiring "extraordinary vision" in recognizing "latent constitutional claims", which were not viewed as the case where similar claims had been litigated earlier. This is Ross' situation for his trial concluded in March 1969; and in footnote 39 of *Isaacs,* the Court noted that three published decisions litigating the constitutionality of burden of proof shifts had been published in 1968, saying the following:

> Even before *Winship,* criminal defendants in courts perceived that placing a burden of proof on the de-

fendants may violate due process. For example, in *Stump v. Bennett*, 398 F.2d 111 (CA8), *cert. denied*, 393 US 1001 (1968), the Eighth Circuit ruled *en banc* that an Iowa rule requiring defendants to prove alibis by a preponderance of the evidence violated due process. The court, moreover, observed: "That an oppressive shifting of the burden of proof to a criminal defendant violates due process is not a new doctrine within constitutional law." *Id.* at 122. See also *Johnson v. Bennett*, 393 US 253 (1968) (vacating and remanding lower court decision for reconsideration in light of *Stump*); *State v. Nales*, 28 Conn. Supp. 28, 248 A.2d 242 (1968) (holding that due process forbids requiring defendant to prove "lawful excuse" for possession of house breaking tools).

Moreover, in 1961, this Court decided in *Mapp v. Ohio*, 367 US 643, 81 S.Ct. 1684, 6 LEd2d 1081 that the Fourth Amendment applied to the states. Between the date of that decision and June 1969, nearly every guarantee in the Bill of Rights relating to criminal trials was made applicable to the states. Therefore, during that time it would have been reasonable (though certainly not mandatory) for defense lawyers to argue that a constitutional right to the burden of proof being borne by the government was applicable to the states under the Fourteenth Amendment in view of the substantial literature on this from cases beginning in 1881:

> Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required (cites omitted). Mr. Justice Frankfurter stated that "[i]t is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic procedural content of 'due process.'" Leland v. Oregon, supra, at 802-803, 96 L Ed at 1311 (dissenting

> opinion). In a similar vein, the Court said in Brinegar v. United States, supra, at 174, 93 L Ed at 1889, that "[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into the rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."

In re Winship, supra, at 362. In light of this, the problems of "extraordinary vision" and the "[objection] to every aspect" which the Supreme Court indicated hesitancy over, *Isaac id.* at 131, are not present here, indicating that Ross' case is not within this possible cause.

Similarly, it is hard to describe Ross' claims in terms of the miscarriage of justice comprehended by *Sykes.* Generally speaking, the presumptions of malice and unlawfulness and use of a deadly weapon are not only rational but often so compelling that all they do is prevent a doubting Thomas approach to the evidence; and the constitutionality of placing the burden of proof on self-defense is determined only by the mechanistic test of whether state law describes its crimes as "unlawful" in setting out their elements.[4] Additionally, in this case, the burden of proof, in the main, was on the state; it was similar to the one in *Isaac* in which no cause was found; it was

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[4] Compare the Fourth Circuit decisions in *Frazier v. Weatherholtz,* 572 F.2d 994 (4th Cir.), *cert. denied,* 439 US 876, 99 S.Ct. 215, 58 LEd2d 191 (1978) and *Wynn v. Mahoney,* 600 F.2d 448 (4th Cir.), *cert. denied,* 444 US 950, 100 S.Ct. 423, 62 LEd2d 320 (1979). The first of these cases holds Virginia's placement of the burden of proof on the accused with regard to self-defense constitutional while the second holds that North Carolina's placement is unconstitutional.

similar with regard to self-defense to the allocation of the burden on insanity which may be constitutionally put on a defendant, *Rivera v. Delaware,* 429 US 877, 97 S.Ct. 226, 50 LEd2d 160 (1976); and it was dissimilar from *Mullaney* with regard to the presumptions from use of a deadly weapon.

Several reasons appear why novelty and cause were spoken of in such restrictive terms in *Isaac* and *Sykes.* First, novelty has a possibility of being refined into an exception which can eat up a lot of the rule. The Fourth Circuit already has moved the proposed end of novelty from 1968 to mid-1970 in this case and some court presumably could try to move it to mid-1975 when *Mullaney* was decided. Second, the Fourth Circuit's apparent refusal to honor this Court's plain language in *Isaac* shows what all lawyers know—that precedents are worth challenging because they only have the value judges are willing to give them and the ambiguity of the English language in some cases and its precision in others along with varying fact situations give lawyers a lot of leeway to argue. Finally, the fact that precedent limits the odds of success on a particular issue is not the only consideration in deciding on appellate arguments. A sense of right figures in, as does a sense of aggrievement. A sense of challenge figures in; as does a sense of necessity. This is shown generally by the fact that convicted criminals still appeal even though the government wins the overwhelming number of appeals; and it is shown in this particular case by the fact that in the District Court, novelty did not stop the undersigned from successfully trying to change the law; and in the Fourth Circuit, it did not stop Mr. Ross' lawyer from successfully challenging this Court's apparent decision in *Isaac.*

Moreover, even where a novel claim is involved, this Court has suggested a possible answer to the question of whether or not novelty is sufficient to show cause by referring to Mr. Justice Harlan's separate opinion in *Mackey v. United States,* 401 US 667, 675-702, 91 S.Ct. 1160, 28 LEd2d 404 (1971). There, he urges that generally the strongest factors in making a decision on retroactivity (a parallel to the situation involved here) are the interests of finality as being helpful to both society and the prisoner, with the latter's interest being in an acceptance of conviction, though possibly wrong, which frees him to shift his energy toward the future; the drain on limited criminal resources that retrial entails when others have not been tried initially; the fact of staleness (here 13 years) which often means as unreliable result from a second trial as from the first. All these would apply here to support respondent's position. Although Mr. Justice Harlan offered as an exception to the above one which might be considered to undercut Reed's position—the situation where procedures did not include those things implicit in the concept of ordered liberty, with burden of proof possibly being so implicit, as noted two paragraphs above, on the facts of this case the burden of proof was adequate to meet the above tests.

CONCLUSION

In conclusion, Daniel Ross failed to utilize the sole remedy for review of his claim under state law, appeal this presumptively was relied on to deny him collateral relief in state court, which, in turn, required a forfeiture

in federal court under *Wainwright v. Sykes*, 433 US 72, 97 S.Ct. 2497, 53 LEd2d 594 (1977), unless cause to excuse it and prejudice from the claim were shown. Cause was not shown, even if prejudice was. Therefore, the Court of Appeals should be reversed.

Respectfully submitted this 27 day of January, 1984.

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ADDENDUM

REQUEST FOR JUDICIAL NOTICE

The parallel state proceedings in this case were not made a part of the record below. The parties request that judicial notice be taken of them. Reed also requests the appeal briefs in the North Carolina Supreme Court be judicially noticed. Parts of the above are excerpted in this section and the items in full will be filed with the Court, under seal, for the Court's further inspection. The parties believe that judicial notice is permitted by FRE 201(f).

EXCERPT FROM DEFENDANT'S BRIEF IN THE NORTH CAROLINA SUPREME COURT

(10) The Court below erred in failing to apply the law to the evidence as required by North Carolina GS 1-180, in that it did not properly charge the jury as to the doctrine of self-defense, said doctrine of self-defense being asserted by the defendant, i.e., that the defendant was in a place where he had a legal right to be; that the defendant was without fault in bringing on the difficulty; that the deceased had ill will toward him; and that the deceased advanced on him and stabbed him.

EXCEPTION NO. 16 (R. p. 38).

If a felonious or murderous assault is made upon a person who is without fault, he is not required to retreat, but may stand his ground and kill his assailant if need be. State v. Thornton, 211 NC 413, 190 SE 758. And evidence tending to show that the defendant was where he was entitled to be, and was without fault in bringing on

and entering into the difficulty, and the deceased had ill will toward him and was advancing upon him at a distance of 10 to 12 feet with an open knife, is sufficient under this principle. *State v. Guss,* 254 NC 349, 118 SE 2d 906.

The Court failed to charge the jury that if excessive force or unnecessary force is used in self-defense, the defendant is guilty of manslaughter at least. *State v. Mosley,* 213 NC 304, 195 SE 830.

The Court failed to relate the doctrine of self-defense to the evidence in that the defendant asserted the doctrine as to the deceased as well as Leon Young and Charles McAllister. The Court further failed to instruct the jury that if they believed that the defendant shot at the deceased and at Leon Young and Charles McAllister in self-defense, he would be entitled to an acquittal.

EXCERPTS FROM WRIT FILED 2 DECEMBER 1978

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA
COUNTY WAKE

DANIEL ROSS,

Relator,

v.

L. V. STEVENSON, Superintendent of Calendonia Prison Farm, Tillery, N. C. 27887,

DISTRICT ATTORNEY for the Tenth Judicial District Wake County Superior Court,

Respondents.

PETITION FOR A WRIT OF
POST-CONVICTION REVIEW

No. _____

• • •

5. Relator is presently restrained unlawfully because the State of North Carolina has NOT proven that:

• • •

(b) That the prosecution proved self-defense beyond a reasonable doubt under North Carolina law;

(c) The instructions did not place the burden on relator to persuade the jury that the relator was not guilty by proving that the killing was not unlawful;

EXCERPTS FROM ORDER ON WRIT FILED
2 DECEMBER 1978

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File # 70 CR 44248

STATE OF NORTH CAROLINA
COUNTY OF WAKE

STATE OF NORTH CAROLINA

vs.

DANIEL ROSS

O R D E R

• • •

The record reveals the following:

1. That petitioner was tried in Wake Superior Court on March 19, 1969 on a charge of murder in the first degree; a guilty verdict was returned and the petitioner sentenced to the State Prison for the remainder of his natural life; the petitioner appealed to the North Carolina Supreme Court; and the judgment of the North Carolina Supreme Court dated October 28, 1969 found no error; Order affirming prior decision received from the Supreme Court denying Petition for Writ of Certiorari dated May 14, 1970.

2. Order marked Order of Court of Appeals denying Petition for Writ of Certiorari dated July 11, 1973.

3. Order of Judge McKinnon giving credit dated March 5, 1974.

4. Petition for Writ of Post-Conviction dated May 10, 1974 along with an Order of Judge McKinnon dated May 29, 1974 denying and dismissing said petition.

And the Court having considered the petition with the record in the case is of the opinion that it states no grounds for relief under the post-conviction review act.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the petitioner's petition be, and the same is hereby denied and dismissed;

EXCERPT FROM PETITION FOR WRIT OF CERTIORARI TO REVIEW DISMISSAL OF WRIT FILED 2 DECEMBER 1978

2. The court, in its charge, placed upon the petitioner burdens of proof later held by the United States Supreme Court to be violative of the due process clause of the Fourteenth Amendment, *Mullaney v. North Carolina*, 421 U. S. 684, 95 S. Ct. 1881, 43 L. Ed. 2d 508 (1966) which ruling was given retroactive effect in *Hankerson v. North Carolina*, — U. S. —, 97 S. Ct. —, 53 L. Ed. 306 (1977), and appears at (Rp. 42).

3. Due process requires the prosecution to disprove self-defense beyond a reasonable doubt under North Carolina law. The Court, in its charge, to the jury that the State makes a contention in connection with the assault which the petitioner *contends* his wife made upon him that you should not find that she made any assault on him; and that if there is any evidence that you accept as true with respect to his having suffered an injury on his neck and later received treatment for that in a Virginia Hospital, that it was an injury that produced himself in order to set up a defense, which the State *contends* you should not accept (Rp. 48). This charge permitted the jury to reach a different legal conclusion in petitioner's case from that which they might reach in another case presenting identical facts, under *Mullaney v. Wilbur*, 421 U. S. 684 (1975); *Ivan v. City of New York*, 407 U. S. 203 (1972); *Hankerson v. North Carolina*, No. 75-65 — U.S. — (1977).

EXCERPT FROM STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO REVIEW DISMISSAL OF WRIT FILED 2 DECEMBER 1978

4.

Petitioner now seeks a writ of certiorari from the North Carolina Court of Appeals for further review in this matter. Petitioner contends that the trial court erroneously instructed the jury, in violation of the decision in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975). Allegations relating to jury instructions should have been raised on direct appeal. Assertions which were made or could have been made on direct appeal cannot be asserted or reasserted in post-conviction proceedings. *State v. White*, 274 N.C. 220 (1968). Petitioner has also submitted several previous petitions for post-conviction review in which he could have raised this issue. N.C.G.S. 15-218 prohibits raising a ground in a successive petition which could have been raised earlier, and any claims not alleged in previous petitions are deemed waived. *State v. Green*, 2 N.C. App. 391 (1968). Therefore, petitioner is not entitled to the relief he is now seeking.

ORDER ON WRIT OF CERTIORARI

NO. 78SC17PC

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

v

DANIEL ROSS

County: Wake
Number: 70CRS44248

ORDER
(Filed February 24, 1978)

The following Order was entered:

"The petition filed in this cause on the 9th day of January, 1978, and designated Petition for Writ of Certiorari is denied by order of the Court in conference. This the 23rd day of February, 1978."

The above order is therefore certified to the Clerk of the Superior Court in Wake County, North Carolina.

Witness my hand and official seal this the 24th day of February, 1978.

/s/ Francis E. Dail
Clerk of the Court of Appeals

No. 27 PC

STATE OF NORTH CAROLINA

v.

BROWER AND JOHNSON

ORDER DENYING MOTION FOR RECONSIDERATION

INASMUCH as defendants did not assign as error on appeal the failure of the trial judge to place the burden of proving the absence of heat of passion or the absence of self-defense on the state, *see State v. Brower & Johnson*, 289 N.C. 644 (1976), they have waived their right now to complain about such errors. *Hankerson v. North Carolina*, — U.S. —, 53 L.Ed. 2d 306, 316, n. 8 (1977). Now, therefore, it is

ORDERED by the Court in Conference that defendants' motion for reconsideration be and it is hereby denied.

This the 12th day of September, 1977.

James G. Exum, Jr.
Associate Justice
For the Court

No. 90

STATE OF NORTH CAROLINA

v.

KELLY DEAN SPARKS

ORDER FOR NEW TRIAL UPON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

HAVING reconsidered this case on remand from the Supreme Court of the United States in the light of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508 (1975), and *Hankerson v. North Carolina*, — U.S. —, 53 L.Ed. 2d 306 (1977), the defendant having properly raised on appeal to this Court the question of the constitutionality of the trial

judge's instructions placing the burden on the defendant to show that the killing was done in the heat of a sudden passion and that it was done in self-defense, *see State v. Sparks*, 285 N.C. 631 (1974), and being of the opinion that in light of *Mullaney* and *Hankerson*, these assignments of error should have been sustained and defendant awarded a new trial, now, therefore, it is

ORDERED by the Court in Conference that defendant be and he is hereby awarded a new trial.

This the 12th day of September, 1977.

James G. Exum, Jr.
Associate Justice
For the Court